

Comment Report:

Draft Discussion Document Regarding the Disposition of
Culturally Unidentifiable Native American Human Remains
In the Possession, Custody or Control of the Maryland Historical Trust
(Draft 3.4, dated July 20, 2007)

November 2, 2007

On August 3, 2007, the Maryland Department of Planning issued a press release announcing an agreement with the Maryland Commission on Indian Affairs (the Commission) to cooperatively consider the appropriate place of repose for those Native American remains currently in the care of the Maryland Historical Trust (the Trust, a unit of the Department of Planning). Staff of the Trust presented a proposed process for conducting consultations at the September public meeting of the Commission, and together with the Commission invited comments regarding the process. Comments were received until October 17, 2007. The purpose of this report is to characterize and summarize the comments received, and explore their implications for the consultation process.

Seven individuals provided comments verbally during the September Commission public meeting, while twenty sets of written comments were received during the comment period by either the Commission or the Trust, or both. Two commenters provided verbal (during the public meeting) and written comments, and one commenter provided two sets of written comments.

Commenters provided between one and fifteen comments per submittal (including the public meeting), for a total of 116 comments received. While most of the comments received (83) were concerned with the consultation process (Table 1), some (25) were concerned with the substance of the consultation and will only be summarized here (Table 2) as they do not impact the consultation process. A third group of comments were editorial, requests for more information, or were concerned with details presented in the draft discussion document (8, Table 3).

Table 1. Process Comments; Types.

Comment Category	Count
Associated Funerary Objects	2
Change in State Regulations	2
Comment Period	1
Compromise	1
Cultural Affiliation	1
Detail	1
Disagreement	1
Editorial	7
Federal Experts	1
Future Cases	2
Initial Proposition 1: Reburial	6

Table 1, continued. Process Comments; Types.

Comment Category	Count
Initial Proposition 2: State-Owned Land	1
Initial Propositions	1
Interested Parties	4
Law	2
Lineal Descendants	1
Mediator	2
NAGPRA Review Committee	1
Prior Consultation	2
Progress	1
Recognition	1
Recognized Tribes	3
Records	1
References	1
Designees	8
Revision	1
Schedule	10
Secretary's Role	2
Spiritual Leading	1
Study	8
Support	1
Working Group Meetings	6
Total	83

Table 2. Substance Comments; Types.

Comment Category	Count
Burial Rites	5
Editorial	1
Law	2
Reburial Location	7
Recognition	1
Study	1
Subsurface Facility	2
Traditional Care Practices	2
Transfer	4
Total	25

Table 3. Document Comments; Types.

Comment Category	Count
Detail	7
References	1
Total	8

Discussion of Comments Concerning the Proposed Process.

Comment topics are presented below ordered according to the number of comments received. The exception to this is the “editorial” comments category. These comments represent the opinion of the commenter, and they are discussed at the end of this section.

Schedule (10 Comments). There were two types of comments regarding the consultation schedule. The first type addressed the length of time over which the consultation process would take place, others requested clarification regarding the schedule.

Four commenters expressed a hope that the consultation process would not be long and drawn-out, while four commenters felt that the one-year limit for consultation was too short. In particular, those feeling that one-year was not enough time to complete consultations noted that such a limit was unrealistic given the complexity of the issues, displayed a lack of commitment to adequate consultation, and was insensitive to non-western concepts of time.

The draft plan was written to anticipate the concern that the process might take too long, and included an opportunity for the Secretary of Planning to become personally involved if consultation did not result in consensus after one year. The plan did not, however, limit consultation to one year. The one-year point was meant as an opportunity to evaluate the process, and to determine the likelihood of ultimate success in reaching consensus. In fact, choices for the Secretary were outlined in the plan should consultation fail to reach consensus within one year. These options included (1) continuation of consultation, (2) designation of a new appropriate place of repose without consensus. There are actually more options than were listed in the plan. The Secretary may consult with the MCIA and MHT independently, or the Secretary may decide that designation of a new appropriate place of repose is not warranted based on the differences that became apparent during the consultations between MCIA and MHT. In addition to being unclear about the full range of possibilities, the draft plan also placed too much responsibility in the hands of the MHT to influence the decision of the Secretary. The plan has been revised to clarify the equal role of all the designees, and to expand the menu of possibilities to better reflect the range of outcomes available.

Two commenters felt that the plan required more definitive waypoints or benchmarks to assist the designees in deciding to move on to the next steps. Two specific waypoints were identified as unclear in the plan: (1) the point at which changes to State regulations will be sought, and (2) the point at which federally recognized tribes will be consulted.

The plan has been modified to specify that consideration of possible changes in State regulations does not occur in the plan until the designees “feel that a consensus is likely” that they will recommend the Secretary designate an appropriate place of repose that is in the ground. Burial of the remains could represent at least two possible points of conflict with current regulations (transfer and long-term preservation). The consideration of changes in regulations is not considered earlier as there are many possible outcomes of the consultation that would not require changes to regulations.

Consultation with federally recognized tribes, in a similar fashion, is delayed in the plan until a Secretarial decision to designate a new appropriate place of repose that is in the ground. At issue is the ability of tribes to make claims for transfer of the remains. Burial of the remains could

affect such transfers. If consultation leads to either no change, or a change that does not affect future transfers, consultation with tribes (and NAGPRA Review Committee) would not be necessary. The consultation plan has been modified to make this clearer.

One of these commenters also felt that these benchmarks needed to include the possibility of a loss of control for the designees, as such a consequence might act as an incentive to reach consensus. The one-year benchmark, with the possibility of loss of control for the designees, is believed to be incentive enough.

Designees (8 Comments). Four types of comments regarding the designees were received. One commenter wondered about the ability of five individuals to represent all of the diversity in the Maryland Indian community. One commenter was concerned specifically about the independence of designees, given that MCIA Commissioners and Maryland Advisory Committee on Archeology (the Advisory Committee) are gubernatorial appointees. Four commenters felt that better definition, or specification, of the MHT designees was needed. Finally, two commenters suggested that an expert in anthropological analysis of human remains be added to the designees group.

The consultation plan has been modified to specify some additional groups from which MHT might select designees. No change to the MCIA designees was made. It is up to the MHT and the MCIA to designate designees that they feel will best represent the diverse perspectives of their constituencies. The ability of designees to act independently is, it is hoped, emphasized and enhanced by adding a sentence to the consultation document decoupling an individuals service as a designee and their tenure on any commission, committee, or board, or their membership in any group.

Two commenters suggested that a specialist in anthropological analysis of human remains be included in the designees group. There is nothing in the plan that precludes the MHT or the MCIA selecting such an expert as one of their designees. The plan has, however, been modified to specify that a presentation by an expert in such analysis be offered at one open session of the designees group. In the revised plan this is balanced by a presentation by an expert, or experts, in Native American spirituality and customary burial practices at another open session (see “Spiritual Leading” below).

Study (8 Comments). Two commenters stated that the remains should never be studied again, one of them stating that study was precluded by previous agreements. Under current state regulations, institutions interested in studying human remains in the Trust’s collections may present a formal proposal for study. Such requests can be approved by the Trust after consultation with the MCIA and the Advisory Committee. Requests originating in the Trust must also be reviewed by the Burial Sites and Objects Review Committee (the Burial Committee).

Three commenters wondered why the process held consideration of study until after the consideration of the initial proposition that the appropriate place of repose should be in the ground (e.g. reinterment). One of these commenters specifically suggested that the consideration of study logically belonged before the consideration of reinterment. However, under the plan

the designees' primary task is the consideration of the place of appropriate repose, not study. If the designees agree that the appropriate place of repose should be in the ground, then the effect of this on any future request for transfer to study would have to be considered. Many possible logical outcomes of the consultation do not, however, necessitate consideration of study. The consultation document has been revised to place consideration of transfer after consensus appears to be building for an appropriate place of repose that is in the ground, but before a final consensus is reached. Further revision of the document draws attention to the possibility of many different outcomes of the consultation process. See also the discussion of study in the regulations under "schedule" above.

Three commenters stated that further, or future, study of the remains would have value. One of these commenters specifically stated that a specialist in the study of human remains should explain the value of such study to the designees. Specialist presentations regarding the value of study has been added to the plan (see discussion under "Designees" above). As noted above, a process for study is already included in State regulations, and there are many possible outcomes of the consultation process that will have no effect on study.

Initial Proposition 1: Reburial (6 Comments). Five comments noted that the focus in the consultation document on reinterment was unduly exclusive, and either diminished the value of other possible outcomes, or precluded their consideration at all. The consultation document has been revised to clearly indicate that reinterment is only one possible outcome of the process, and that other possibilities might not affect future transfers for either repatriation or study.

One comment noted that invoking original intent as a justification for reinterment was problematic when no information regarding the recovery of the remains was currently available. While this is true, it can also be noted that no recovery context other than in-ground burial has ever been archeologically noted for prehistoric remains in Maryland or surrounding states.

Working Group Meetings (6 Comments). Five comments focused on the openness of the designees' meetings. The need for full and adequate publicizing of upcoming meetings, and the keeping of careful records of the meetings, was stressed. The conduct of the meetings is left up to the designees in the consultation document. However, at a minimum there are to be two open sessions with specialist presentations. Staff of the Commission and the Trust are to ensure that the designees have adequate technical and clerical resources.

One commenter wondered when the designees would begin meeting. The consultation document has been revised to require the first meeting within 30 days of full designation (c.f. when all 10 have been designated).

Interested Parties (4 Comments). One commenter wondered how the views of interested parties were to be solicited. The consultation document has been revised to require the solicitation of comments from groups and individuals identified by the designees as interested parties. The document further requires that the designees will solicit written comments from interested parties as progress warrants during the consultations. The document also now

specifies that, at a minimum, Maryland Indian groups and those groups representing the archeological community in Maryland are to be defined as interested parties.

Two commenters offered groups that have an interest in the consultations. The designees will be made aware of these suggestions.

One commenter suggested that the designees accept no anonymous comments. This comment will be forwarded to the designees.

Recognized Tribes (3 Comments). Two commenters noted the need to consult with federally recognized tribes, while one commenter felt that involving outside tribes would complicate the consultations. The consultation document takes appropriate note of the need to consult with federally recognized Indian tribes. Seeking consensus among those parties specified by State regulations, however, comes first, as the designation of an appropriate place of repose is a State matter. Should the designated appropriate place of repose impinge on the ability of a tribe to make a claim for repatriation of any of the remains, however, the document specifies how consultation with the tribes, and presentation to the NAGPRA Review Committee, will be handled.

Associated Funerary Objects (2 Comments). Two comments were received that questioned the place of associated funerary objects in the designation of the appropriate place of repose. Under State law and regulations, the appropriate place of repose is solely designated for human remains. Further, the Federal regulations implementing NAGPRA with regard to unidentifiable human remains do not discuss associated funerary objects. However, objects in the care of the Trust that were clearly associated with human interments, when this is known, are currently kept in the appropriate place of repose along with the associated human remains. The NAGPRA regulations, while silent regarding objects associated with unidentifiable remains, do not preclude their consideration. The consultation document neither requires or prohibits the designees' consideration of associated funerary objects.

Change in State Regulations (2 Comments). One commenter wondered who would pursue changes in State regulations, and for how long. Because the regulations in question implement the act that establishes and empowers the Trust, the consultation document specifies that the Trust will pursue regulatory changes. The document has been revised to suggest that such changes will be pursued with the support of the Commission. Changes will be pursued until they are achieved, or until it becomes clear that they will not be possible. If change in regulations is required for the recommendation of the designees or the determination of the Secretary, and they cannot be achieved, then reconsideration of the recommendation or determination will be necessary. The document has been revised to make clear that regulatory changes would be sought only as required to be consistent with the Secretary's designation of an appropriate place of repose.

Future Cases (2 Comments). Two commenters wondered how Native American human remains coming into the possession, custody or control of the Trust would be handled. The

document makes it clear that current policy of the Trust actively discourages the excavation of human remains. This policy also calls for consultation with the Commission whenever the remains of Native American human remains are encountered during archeological excavation. The avoidance, reinterment, treatment, or collection of such human remains would presumably be considered during these consultations. However, there is nothing in the current document that precludes the designees specifically considering the treatment of any possible future occurrences.

Law (2 Comments). One commenter suggested that NAGPRA did not apply to Native American human remains in the possession, custody or control of the Trust, while another suggested that the proposed consultation ignored NAGPRA. NAGPRA would apply if the Secretary was to designate an appropriate place of repose that in any way impinged on the ability of a federally recognized tribe to make a claim for repatriation. Such a circumstance is anticipated in the consultation document.

Mediator (2 Comments). Two commenters suggested that the designees group be expanded to include persons trained in mediation. The consultation plan has been amended to include the possibility of augmenting the designees group with an individual or individuals trained in mediation, conflict resolution, or meeting facilitation. The addition of these skill-sets would be at the request of the designees, and would be the responsibility of the Secretary.

A further change to the consultation plan designed to maintain balance between the designees of the MCIA and the MHT is the specification of co-chairs, one from each group. The co-chairs will alternate the chairing of meetings.

Prior Consultation (2 Comments). One commenter suggested that review of consultation that occurred during the 1990s could be instructive, and save the designees time in the current consultation. One commenter suggested that the proposed consultation were not needed, as all topics had been resolved in prior consultations. These comments will be brought to the attention of the designees.

Secretary's Role (2 Comments). One commenter suggested expanding the active role of the Secretary as a process arbitrator. This commenter felt that elevating decisions in the face of inability of the designees to reach consensus could serve as a stimulus. The Secretary's involvement in the process, should consultations fail to reach consensus after a year, has been clarified in the revised consultation document.

Another commenter noted that allowing the Secretary to determine the appropriate place of repose after a year and without consensus was contrary to the spirit of consultation. The Secretary's authority to designate the appropriate place of repose comes from State law and regulations, not from this consultation plan. Nothing in the plan, which is entirely about consultation, requires the Secretary to suspend that consultation after a year (this has been clarified in the consultation document, see above under Schedule), nor is the Secretary required to designate an appropriate place of repose at any point by the plan.

Comment Period (1 Comments). One commenter requested that the comment period be extended until October 13th. The comment period was so extended.

Compromise (1 Comments). One commenter inquired about the role of compromise in the process. That will be up to each individual designee to decide, and is not specified in the document.

Cultural Affiliation (1 Comments). One commenter wondered if all the Native American human remains considered under the consultation plan were affiliated with the Piscataway-Conoy. Thirty-six (36) of the one hundred thirty-nine (139) individuals whose remains are included under the consultations can be affiliated with the historically known Piscataway. The other one hundred three (103) individuals cannot be affiliated with any historically known Indian group.

Disagreement (1 Comments). One commenter asked what would happen if the designees agreed regarding one of the two initial propositions, but not about both. The plan specified steps to be taken if both were accepted by the designees, but was silent about the path to be followed in the face of possible disagreement. The consultation document has been amended to make clear that alternatives to reinterment on State-owned or controlled land are in fact possible.

Federal Experts (1 Comments). One commenter noted that experts on the Federal NAGPRA process who should be consulted. Many such experts have been consulted, and this consultation continues.

Initial Proposition 2: State-Owned Land (1 Comments). One commenter made clear that the remains should be reinterred on land owned by indigenous groups in Maryland. The document discusses both State and Federal law and regulations that make such a transfer difficult.

Initial Propositions (1 Comments). One commenter objected to the stating of any initial propositions, noting that if any were offered, all should be. The document has been revised to make clear that the initial propositions are offered as points of departure for consultations, and that other outcomes are possible.

Lineal Descendants (1 Comments). One commenter suggested that only lineal descendants should be involved in the disposition of human remains. Unfortunately, lineal descendants cannot be identified for any of the 139 individuals considered under this plan. Further, no culturally affiliated tribes (as defined in Federal and State law and regulations) have been identified for any of the remains. If either lineal descendants or culturally affiliated tribes could be identified for the remains, they would have been repatriated under NAGPRA and State law.

NAGPRA Review Committee (1 Comments). One commenter wondered what would happen if the NAGPRA Review Committee did not approve the plan. Under the process, if the Review Committee was consulted, then the proposed designation of the appropriate place of repose must necessarily have the ability to impinge on the ability of a federally recognized tribe to make a claim for repatriation in the future. In such a case, the Review Committee's approval (or, rather, recommendation that the Secretary of the Interior approve) of the plan is required. Without that approval, the proposed designation could not move forward.

Progress (1 Comments). See comments under Schedule above.

Recognition (1 Comments). One commenter felt that the plan either de facto recognized Maryland Indian groups, or ignored that no such groups have been recognized. The process is specifically designed as between the Commission and the Trust precisely because there are currently no recognized tribes in Maryland. The process neither recognizes, nor can it recognize, any specific group.

Records (1 Comments). One commenter wondered who would keep records of the consultations. The staff of the Commission and the Trust appointed to the work with the designees will make sure that records are maintained.

References (1 Comments). One commenter asked that relevant laws and regulations be posted on the internet. This was done on September 5, 2007.

Revision (1 Comments). One commenter wondered if the consultation document could be revised. As a result of comments received during the comment period, the document has been revised by staff of the Trust, with input from staff of the Commission.

Spiritual Leading (1 Comments). One commenter urged that the role of spirituality in any consultations dealing with human remains be taken seriously, and incorporated into the plan. The consultation document has been revised to include presentations to the designees at an open session by experts in Native American spirituality and traditional burial practices.

Support (1 Comments). One commenter offered support for the process as proposed.

Editorial (7 Editorial). Seven commenters offered opinions regarding the proposed consultation process. One commenter expressed the opinion that the process was fair, another that it offered an opportunity for protection of the human remains. One commenter felt that the process was overly optimistic, while another offered that interested parties were not ready to work together.

A commenter hoped that recognized tribes should support Maryland Indian groups, while another hoped that individual needs would be held as secondary to group needs.

Other comments regarded the substance of the matters to be discussed among the designees. All such comments will be forwarded to the designees at their first meeting.